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ABSTRACT

This paper discusses the proper way to conduct official government investigations on college campuses within the framework of the Fourth Amendment to the United States Constitution which protects against unreasonable searches and seizures. The article emphasizes that this amendment lays the groundwork for the limitations on the exercise of governmental power to inspect the property or to detain members of the populace. After discussing various facets of this application of the Fourth Amendment to search and seizure on college campuses, the article argues that, as a practical matter, universities should review their search policies to assure that they will remain within the special needs doctrine and to devise procedures that fit the contours of special needs jurisprudence. The article refers to various court decisions in the course of the discussion to buttress the author's arguments. The author further argues that university policy should carefully limit the scope of warrantless searches, e.g., the grounds for entering a room, the contraband sought, would determine what portions of the room could reasonably be searched. Many laws and court cases are cited throughout. (CK)

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CAMPUS LIFE AND GOVERNMENT INVESTIGATIONS
June 16-19, 1996
James F. Shekleton, Ph.D., J.D.
South Dakota Board of Regents
Pierre, South Dakota

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Basic Principles

I. The Fourth Amendment to the United States Constitution lays the ground for the American jurisprudence surrounding the limitations on the exercise of governmental power to inspect the property or to detain members of the populace:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. A search compromises an individual's interest in privacy; a seizure deprives the individual of dominion over his or her person or property. *Horton v. California*, 496 U.S. 128, 133 (1990). The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985).

A. Those who framed the Constitution were especially concerned to prevent government officials from conducting general searches of the sort British colonial officers employed to enforce parliamentary revenue acts. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978). Typical of American warrants of the 1761-1776 period was Starke's "tobacco" warrant, which commanded its bearer to "enter any suspected Houses." Such warrants, while including text that calls for individualized suspicion, left ample ground for subjective judgment and were largely unenforceable. As a practical matter, such warrants authorized virtually unrestrained and, hence, "general" searches. *Vernonia School Dist. 47J v. Acton*, 115 S.Ct. 2386, 2398-99 (1995) (O'Connor, dissenting).

1. The requirement that warrants particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another, *Walter v. United States*, 447 U.S. 649, 656 n.7 (1980) (citing *Marron v. United States*, 275 U.S. 192, 196 (1927)), subject to exceptions as noted in subparagraph 4 below.

2. The scope of a search is limited by the object of the search. *Horton*, 496 U.S. 128, 140-42 (1990) (citing *United States v. Ross*, 456 U.S. 798, 824 (1982)) (just as probable cause to believe that a stolen lawn mower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase).

3. Exploratory searches may not be undertaken, whether with or without warrant. The Court will not permit the use of "a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined search and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Walter*, 447 U.S. at 653 (citing *Stanley v. Georgia*, 394 U.S. 557, 569 (1969) (Stewart, J., concurring)).

4. BUT NOTE: Seizure of contraband evidence in plain view is permitted without any additional warrant but if and only (a) if the police are lawfully present at the place where the evidence is observed, (b) if its incriminating character is immediately apparent and (c) if the police have a lawful right of access to the articles to be seized. *Horton*, 496 U.S. at 134-37. Because the scope of a search is

determined by the nature of the objects sought, a search that is justified in relation to one object establishes sufficient ground to seize another if the latter is found in plain view, notwithstanding the fact that police may have suspected that the second object might also be found but lacked sufficient grounds for that suspicion to justify a search. *Id.* at 138-40.

B. The Fourth Amendment protects individual expectations of privacy that society accepts as objectively reasonable. *California v. Greenwood*, 486 U.S. 35, 39 (1988); *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Oliver v. United States*, 466 U.S. 170, 177 (1984); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). A subjective expectation of privacy will not create a privacy interest unless society is prepared to accept that expectation as objectively reasonable. *Greenwood*, 486 U.S. at 39-40.

1. To claim the protections of the Fourth Amendment, individuals must show that their conduct at the relevant time exhibited an actual subjective expectation of privacy. *Smith v. Maryland*, 442. U.S. 735, 740 (1979).

NOTE: This expectation is assumed in connection with searches and seizures of biological samples from persons. *See, e.g., Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 616, 618 (1989).

2. When weighing the objective reasonableness of expectations of privacy, the Court adopts the perspective of persons who understand fully the social practices that affect the place, property or information in question. *Greenwood*, 486 U.S. at 40-41 (having deposited their garbage in an area particularly suited for public inspection and for the express purpose of having strangers take, respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded); *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (phone users have no legitimate expectation of privacy in pen register data since all telephone users realize that they convey phone numbers to the telephone company, and all subscribers realize that the phone company has facilities for making permanent records of numbers they dial, for they see a list of their toll calls on their monthly bills).

3. Individuals objecting to searches must show that they had reasonable expectations of privacy in the areas searched, not merely in the items found. *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980). In determining whether individuals have expectations of privacy in particular objects or places, the analysis should consider their property interests in them, their rights to control them as evidenced by their presence in or access to the area to be searched and their ability to exclude others, their subjective expectations of privacy in the area as evidenced by their efforts to ensure that privacy, and society's willingness to recognize such expectations as reasonable. *United States v. Horowitz*, 806 F.2d 1222, 1225 (4th Cir. 1986) (defendant could not establish an interest in computer tapes belonging to a company to which he had sold confidential employer information, which he transmitted electronically to the company at a site hundreds of miles from his home, where the information was stored on magnetic data tapes).

4. What expectations of privacy might be considered legitimate may also vary with the context, *e.g.*, whether it involves a person's home, workplace, car or a public park. *Vernonia*, 115 S.Ct. at 2391; *Skinner*, 489 U.S. at 602. The individual's legal relationship to the State may also affect these expectations of privacy, *e.g.*, the supervisory relationship between a probationer and the state or between K-12 pupils and school officials justifies a degree of infringement on privacy that would not be constitutional if applied to the public at large. *Vernonia*, 115 S.Ct. at 2391-92.

III. The Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. *Skinner*, 489 U.S. at 619.

A. What is reasonable depends on all the circumstances surrounding the search or seizure and the nature of the search and seizure itself. *Horton*, 496 U.S. at 133.

B. Whether a particular practice is permissible is determined by balancing the intrusion on the individual's Fourth Amendment interests against the practice's promotion of legitimate government interests. *Id.* Government officers enjoy greater latitude where individual expectations of privacy are minimal, the extent of the intrusion is small and the government interests significant. *See, e.g., Skinner*, 489 U.S. at 624-33.

IV. The basic functions of the warrant are:

A. To advise the person that an intrusion is authorized by law. *Treasury Employees v. Von Raab*, 489 U.S. 656, 667 (1989); *see also Wilson v. Arkansas*, 115 S.Ct. 1914, 1916 (1995) (discussing common law origins of the requirement).

B. To advise the person of the scope of the authorized search, beyond which limits the government agent may not proceed. *Walter*, 447 U.S. at 656-57; *Marshall*, 436 U.S. at 323.

C. To interpose a neutral magistrate between the person and the law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." *Von Raab*, 489 U.S. at 667 (citing *Johnson v. United States*, 333 U.S. 10, 14 (1948)). The magistrate's function includes both determining probable cause and confining the warrant to reasonable limits. *Zurcher v. Stanford Daily*, 436 U.S. 547, 565-67 (1978).

V. The probable cause requirement arises independently from the warrant clause--probable cause may be required even where a warrant is not--and serves to restrict the power of government officials to conduct searches when they have no grounds to suspect that particular individuals have contraband or other evidence of crime. *Vernonia*, 115 S. Ct. at 2398-99 (O'Connor dissenting) (citing *Carroll v. United States*, 267 U.S. 132, 149, 154 (1925)).

A. Probable cause must ground a belief that a violation of the law has occurred. *T.L.O.*, 469 U.S. at 340.

B. Probable cause is a practical, nontechnical concept. It deals with the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, rely to draw common sense conclusions about human behavior. *Illinois v. Gates*, 462 U.S. 213, 231 (1983).

VI. Criminal investigations conducted by, or at the behest of, law enforcement officers must adhere to standard Fourth Amendment probable cause and warrant requirements if they are to be deemed reasonable. *Vernonia*, 115 S.Ct. at 2390; *United States v. Ross*, 32 F.3d 1411 (9th Cir. 1994) (Fourth Amendment rights violated where airline employee opened package in the presence of police officer after the officer stated that he could not open the package).

A. It remains a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." *Acevedo*, 500 U.S. at 480 (citing *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) and *Katz*, 389 U.S. at 357.

B. Exceptions to the warrant requirement arise

1. where police officers observe unusual conduct leading them to conclude reasonably that individuals may be engaged in criminal activities, and the officers stop the suspicious persons briefly to make reasonable inquiries designed to confirm or to dispel such suspicions; *Terry v. Ohio*, 392 U.S. 1, 30 (1968),

2. where police officers engaged in a permitted arrest conduct a search of the person and immediate surroundings of the person being arrested. *New York v. Belton*, 453 U.S. 454, 460 (1981); *Chimel v. California*, 395 U.S. 752, 762-63 (1969);

3. where police officers properly stop moving vehicles to conduct warrantless searches, provided that they have probable cause to believe that the vehicles contain evidence of a crime; *Carroll v. United States*, 267 U.S. 132, 158-59 (1925); such a search may include the search of any closed containers found within the vehicle to determine whether they might contain contraband or evidence. *Acevedo*, 500 U.S. at 479-80;

4. where police conducting routine inventories of property taken into custody seize contraband or evidence found in plain view in the course of such inventory activities; *South Dakota v. Opperman*, 428 U.S. 364 (1976);

5. where the individuals whose property is to be searched have voluntarily consented to the search; *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); third party consent to search may be relied upon, where public officers have a reasonable basis for believing that the third party who consented to the search occupied the premises jointly with the defendant; *Illinois v. Rodriguez*, 497 U.S. 177, 185-88 (1990) (citing *Stoner v. California*, 376 U.S. 483, 488-89 (1964) (police were not entitled to rely upon consent when they knew that it came from a hotel clerk, knew that the room was rented and exclusively occupied by the defendant, and could not reasonably have believed that the clerk had general access to or control over the room));

6. where articles are already in plain view, neither their observation nor their seizure would involve any invasion of privacy; *Horton*, 496 U.S. at 133.

C. Property that has been abandoned, even if abandoned while being pursued by law enforcement authorities who may not have sufficient grounds to arrest, is subject to no expectation of privacy, and law enforcement authorities require no warrant to take or to inspect such property. *California v. Hodari*, 499 U.S. 621, 629 (1991).

D. Individuals have no reasonable expectations of privacy in material that they have discarded as trash or otherwise placed where it is readily accessible to members of the public; law enforcement authorities require no warrant to take or to inspect such property. *Greenwood*, 486 U.S. at 40-41.

VII. The Fourth Amendment also applies to searches that are justified as part of the enforcement of regulations of general application or of regulations governing particular industries. *Marshall*, 436 U.S. at 311-14. In assessing the reasonableness of administrative searches, courts distinguish between searches involving pervasively regulated businesses and searches involving dwellings or businesses that are not subject to such pervasive regulations. *Burger*, 482 U.S. at 699-701.

A. Warrants are generally required to conduct non-emergency administrative inspections of dwellings or of the nonpublic portions of businesses that are not subject to pervasive regulation. *Camara v. Municipal Court*, 387 U.S. 523, 539-40 (1967) (health and safety inspections of dwellings); *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967) (administrative searches and inspections of commercial establishments).

1. Here the warrant requirement curbs the unreviewed discretion of the enforcement officer in the field. *See*, 387 U.S. at 545. Such warrants may be obtained prior to requesting permission to enter and to inspect the non-public portions of a business. *Id.* at 545 n.6.

2. The standards governing issuance of administrative warrants may vary with the needs of the program to be enforced, *e.g.*, issuance may be permitted based upon the passage of time between inspections, the nature of the structure to be inspected, and the condition of an area; they need not necessarily depend upon specific knowledge of the condition of a particular structure. *Camara*, 387 U.S. at 538.

3. Probable cause justifying the issuance of an administrative warrant may also be based upon specific evidence of an existing violation or upon evidence that a specific business has been selected for inspection on the basis of a general administrative plan for the enforcement of the regulatory legislation, where selection under the plan derives from neutral sources, *e.g.*, dispersion of employees in various industries across a given area and the desired frequency of searches within any subdivisions of that area. *Marshall*, 436 U.S. at 320-21.

B. Warrantless searches to enforce rules of general application are only permitted (a) where an inspection program is required (b) under a comprehensive regulatory program (c) addressing a substantial government need, (d) where the warrantless searches are necessary to achieve the government purpose; provided that (e) the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant by informing parties to be searched that the entry of the government official is not discretionary but pursuant to regulations that also fix the time, place and scope of the investigation. *Burger*, 482 U.S. at 702-03.

C. Administrative searches, whether under warrant or not, cannot be allowed to depart from the scope or purpose that justified them and to take on traditional law enforcement functions. *Michigan v. Clifford*, 464 U.S. 287, 297-98 (1984) (arson investigators lawfully investigating the cause of a fire, *i.e.*, lawfully engaged in an administrative search, violated the Fourth Amendment when they searched the upstairs of a house after discovering the fire started in the basement--their conduct showed that they were searching for evidence of criminal activity, not determining the cause and origin of the fire); *Alexander v. City and Cty. of San Francisco*, 29 F.3d 1355, 1361 (9th Cir. 1994), *cert. denied* 115 S.Ct. 735 (1995) (reversing summary judgment of 42 U.S.C. § 1983 claim brought by the survivors of an individual killed by police who entered his home under an administrative inspection warrant in order to arrest him).

1. The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render a search illegal or the administrative scheme suspect. *Burger*, 482 U.S. at 716. *Cf. Horton*, 496 U.S. at 138 (contraband or evidence encountered in plain sight in the course of a lawful warrantless search may be seized).

2. A warrantless search of a pervasively regulated business is lawful. Ergo, seizure of material encountered in plain sight would be lawful even if the police suspected that it might be encountered, *id.* at 139, but only if their activities remained within the scope of the administrative warrant.

3. It should be noted that the Court specifically found that the legislative history of the regulations at issue in *Burger* demonstrated that they were not adopted or used "as a 'pretext' to enable law enforcement authorities to gather evidence of penal violations." *Burger*, 482 U.S. at 716 n.27. The Court's specific mention of the manner in which the regulations were appliced suggests that the

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application of the regulation might also be subject to scrutiny, i.e., the pretext issue might hinge not only on the creation of the regulation, but also on the application of the regulation to specific facts. States may elect to use police officers to conduct administrative searches. *Id.*, at 717. So long as the regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself, since state police officers have numerous duties in addition to those associated with traditional police work. *Id.*

VIII. A range of exceptions to the Fourth Amendment probable cause and warrant requirements has also been permitted when needs, beyond the normal need for law enforcement, make adherence to those requirements impracticable. *Vernonia*, 115 S.Ct. at 2391 (high school athlete drug testing); *Von Raab*, 489 U.S. at 656 (custom agent drug screening); *Skinner*, 489 U.S. at 602 (drug and alcohol testing pursuant to mandatory regulations by private employers of railway workers involved in accidents or suspected of drug use); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (search of probationer's home for evidence of parole violation); *Ortega*, 480 U.S. at 713-714, 718 (search of public employee's office, desk and files); *T.L.O.*, 469 U.S. at 351 (search of high school student's purse for evidence of rule violation).

A. The special needs exception has been brought into play where, in the course of implementing a program or of carrying out routine internal business activities, government agency officials have a practical need to conduct a search in order to accomplish the objectives of the program. *See, e.g., Griffin*, 483 U.S. at 873-74.

1. The probation programs restrict probationer activities in order to encourage rehabilitation. Accordingly, probation officers must have the latitude and authority to determine the extent to which probationers are in need of close supervision to advance the rehabilitative ends. Imposition of Fourth Amendment standards would tend to destroy the whole object of the relationship, replacing the discretion of the supervisor with that of the magistrate. *Griffin*, 483 U.S. at 875-879.

2. In a K-12 setting, "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in schools." *T.L.O.*, 469 U.S. at 340.

3. The routine retrieval of documents or conduct of inventories implicates none of the Fourth Amendment principles governing criminal investigations. *See, e.g., Ortega*, 480 U.S. at 721. The delay in correcting employee misconduct that would arise were employers required to meet the Fourth Amendment standards that govern criminal investigations would compromise the government interest in ensuring the effective, efficient work of such agencies. *Id.*, at 724.

4. Warrantless, suspicionless drug testing of certain private or public employees and K-12 athletes may be permitted

   a. where it is undertaken routinely pursuant to comprehensive regulations

      i. that define the circumstances under which testing occurs,

      ii. that are well known to the persons who are subject to the testing, and

      iii. that restrict the scope of the testing and the use of the

results,

iv. since requiring adherence to the full panoply of Fourth Amendment conditions and procedures would disrupt the orderly administration of the workplace and would divert resources away from the proper work of the agency, *see, e.g., Von Raab*, 489 U.S. at 666, or

b. where it would impede the effective operation of the program by eroding parental support, encouraging litigation over procedural matters and placing drug detection responsibilities on the instructional staff that are incompatible with the educational responsibilities, requiring special training to detect signs of drug abuse and imposing an adversarial relationship for those that are more consonant with those of an educator. *Vernonia*, at 2396.

B. Warrantless special needs searches cannot be used to conduct criminal investigations, though the fruits of such searches may be made available to prosecutors. *Skinner*, 489 U.S. at 621 n.5 (routine use of evidence acquired through special needs searches would present the question whether the special needs search was genuinely administrative or was merely a pretext for a criminal investigation); *Griffin*, 483 U.S. at 880 (upholding probationer's conviction on weapon's charges where evidence acquired through special needs search); *T.L.O.*, 469 U.S. at 348 (permitting the use in juvenile proceedings of evidence acquired through special needs searches).

C. The highly invasive searches that have been approved by the Court all occurred in settings that limited or that did not involve the use of the fruits of the search in legal proceedings. *Vernonia*, 115 S.Ct. at 2393; *Von Raab*, 489 U.S. at 663 (regulations prohibited disclosure to law enforcement without employee consent); *Skinner*, 489 U.S. at 621 n.5 (though not forbidden, there was no evidence of intent to release drug test reports to law enforcement agencies).

D. Apart from drug testing programs, special needs searches must satisfy what the Court characterizes as the reasonable under all the circumstances standard. The Court believed that this standard would enable government officials to conduct searches where justified by reason and common sense. *T.L.O.*, 469 U.S. at 343. Two factors were required to meet the standard.

1. First, the search must be found to have been justified at its inception.

a. Supervisor searches are justified at their inception where the supervisor has reasonable grounds to suspect

i. that the search will turn up evidence that the employee is guilty of work-related misconduct, or

ii. that the search is necessary for a noninvestigatory work-related purpose such as the retrieval of needed files. *Ortega*, 480 U.S. at 725-26.

b. School searches are justified at their inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. *T.L.O.*, 469 U.S. at 341.

2. Second, the scope of the search must have been reasonably related to the circumstances that justified it in the first place. *T.L.O.*, 469 U.S. at 342.

a. Searches are reasonable in their scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct.

Ortega, 480 U.S. at 726.

b. School searches will remain within permissible scope when the measures taken are reasonably related to the objectives of the search, and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. *T.L.O.*, 469 U.S. at 342.

Application of Basic Principles to University Non-Law Enforcement Search Policies

As a practical matter, except for the most routine inspections, universities should review their search policies to assure that they will be remain within the special needs doctrine. The warrantless routine administrative inspection search permitted under *Burger* would prove a blunt instrument when university officials need to respond to the flow of events in a busy campus environment with its many offices, laboratories, communications and information processing systems, and specialized housing units. Hence, the major task when assessing university search protocols will be to devise procedures that fit the contours of special needs jurisprudence.

I. To lay the ground for special needs searches, make a practical, realistic assessment of the programs or settings in which searches will be conducted, and be prepared to articulate how the probable cause and warrant requirements would interfere with the ability of the institution to operate the program or to conduct its activities in the setting. *Griffin,* 483 U.S. at 876; *Ortega,* 480 U.S. at 726. The practical realities that justify warrantless special needs searches on less than probable cause vary greatly, so the institutional search policy must be responsive to the distinctive places and situations in which such searches might be undertaken.

   A. The *Ortega* efficiency rationale permitting searches for routine work-related purposes or for investigation of work-related misconduct should suffice for most univesity workplace settings, which might encompass "those areas and items that are related to work and that are generally within the employer's control. At a hospital, for example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace." *Ortega*, 480 U.S. at 716. The reach of this formulation ought be sufficient to accommodate those portions of the campus and the associated facilities, furnishings and equipment that are provided to public employees or made available to students in order to carry out the teaching, research and service functions of the university.

   B. The special needs search may be available in some university housing facilities, but not in others, depending upon the use of the housing units and the kinds of programs carried out through them.

      1. Many institutional residences, *e.g.,* lodgings occupied by senior administrators or faculty members, serve in whole or in part as private homes, and the residential quarters should be treated as private homes for Fourth Amendment purposes.

         a. Such residences or private residential quarters do not generally figure among the sites for the conduct of university business and are not generally within the university's control in any sense comparable to the hallways, offices and laboratories that comprise the workplaces on the principal campus. (Consider the extent to which apartments occupied by dormitory staff members may operate more nearly as private residences than do rooms occupied by other dormitory residents.)

         b. Because these residences do not form part of the university workplace or complement of programs, the considerations of efficiency that justify workplace searches do not arise in connection with such sites.

      2. Although *Washington v. Chrisman*, 455 U.S. 1 (1982), relied upon the standard Fourth Amendment doctrines to assess the legality of a criminal investigatory search of a dormitory room, dormitory residents may have diminished expectations of privacy outside the context of criminal investigations.

         a. Dormitory rooms and, sometimes, apartments may be subject to sundry regulations regarding the term of occupancy and the range of activities permitted under the occupancy agreement, all because

these residential facilities play distinctive roles in supporting the educational mission of universities. *Board of Trustees of the State University of New York v. Fox*, 491 U.S. 469, 474-76 (1989) (considering dormitory regulations designed to promote an educational atmosphere on campus, promote safety and security, prevent commercial exploitation of students, preserve residential tranquility); *Prostrollo v. University of South Dakota*, 507 F.2d 775, 778-79 (8th Cir. 1974) (parietal rules require young students to live in an environment that encourages development of study habits, controls confusion and noise, emphasizes academics).

i. Persons who elect to reside in such settings to obtain the benefits they offer should be deemed to accept the diminished expectations of privacy implicit in securing those benefits. *Vernonia*, 115 S.Ct. at 2393 (by choosing to go out for an athletic team, K-12 students voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally); *Von Raab*, 489 U.S. at 667, 672 (employees who seek transfers know that they will be expected to submit to drug tests and should be deemed to have diminished expectations of privacies.).

ii. NOTE: Where parietal rules oblige residents to live in dormitories, some additional consideration may have to be given to the fact that the parietal rules, by requiring them to take up lodgings where expectations of privacy are reduced, operate to deprive students of the opportunity to protect their privacy by leaving contraband at home. *Cf. Ortega*, 480 U.S. at 720 (finding that employees had limited expectation of privacy rested, in part, on the observation that they could avoid exposing personal belongings to search by leaving them at home). *See also Vernonia*, 115 S.Ct. at 2397 (Ginsburg concurring) (underscoring that the constitutionality of a search affecting all students required to attend school would present different constitutional issues by citing *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974)) (in contrast to search without notice and opportunity to avoid examination, airport search of passengers and luggage is avoidable by choosing not to travel by air).

b. In order to justify a warrantless search on less than probable cause, the governmental interest in conducting such a search must be analyzed as a function of the role that dormitory searches play in operating the dormitory to further the educational mission of the university. *See, e.g., Griffin*, 483 U.S. at 873.

i. The university should be able to show that its ability to achieve the purposes for which it operates dormitories would be impaired by a requirement that it search only when it had probable cause to believe that the search would produce contraband or evidence of a crime and then only after securing a warrant.

(a) The transitory nature of some kinds of rule infractions, *e.g.*, boisterous episodes or smoke beneath the door, certainly suggests that seeking a warrant would impair the ability of the institution "to respond quickly to evidence of misconduct and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create." *Griffin*, 483 U.S. at 876 (citing *Burger*, 482 U.S. at 710; *T.L.O.*, 469 U.S. at 340). Caution should be exercised in conducting these searches, for even in the K-12 environment the Court is wary of searches without individual suspicion. *Vernonia*, 115 S.Ct. at 2396, 2397 (Ginsburg concurring) and 2406 (O'Connor dissenting).

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(b) Where the purpose of the search is to uncover evidence of rule violations, the probable cause standard would also appear inappropriate. The delay in correcting student misconduct caused by the need to establish probable cause, as opposed to reasonable suspicion, will often translate into tangible damage to the dormitory environment to the detriment of other students and the public. *Ortega*, 480 U.S. at 724.

(c) Dormitory supervisors are no more likely to be schooled in the niceties of Fourth Amendment jurisprudence than were the school officials in *T.L.O.*, the hospital administrators in *Ortega*, or the railway officials in *Skinner*; hence, imposing the full complement of Fourth Amendment protections would seem to be just as unwieldy and disruptive. *Skinner*, 489 U.S. at 624-25; *Ortega*, 480 U.S. at 725; *T.L.O.*, 469 U.S. at 340.

ii. The initial scope of dormitory searches may be less than that permitted under workplace searches.

(a) The workplace doctrine instructs that the extent of routine access by co-workers to public property, offices, desks or files, is a key factor in determining the reach of an individual's legitimate expectations of privacy in such property. As do public employees, dormitory students have the prerogative of keeping private property in places or furnishings that belong to the university.

(1) The scope of routine entry by university employees into student residences is far more limited than would be the scope of routine entry in the workplace. In particular, university employees would ordinarily have little occasion to examine the contents of student bedding, closets or drawers.

(2) This difference from the workplace setting, coupled with the absence of a custodial relationship akin to those involving public officials and probationers or K-12 students, suggests that dormitory residents have much higher legitimate expectations of privacy in bedding, closets and drawers than employees might have in office furnishings or K-12 students in school lockers.

(b) Consequently, special needs dormitory searches may prove to be limited more stringently than workplace searches. It would doubtless be prudent to expect that universities would have specific, immediate grounds to press a special needs search to a point at which it encompassed dormitory student bedding, closets or drawers.

(c) Dormitory rooms themselves, together with their electric and mechanical fixtures and equipment, would appear to present yet another set of issues. Occupant expectations of privacy in such areas could well be diminished, since routine or emergency inspection of such equipment would preclude legitimate expectations that materials stored there would remain out of view.

c. Although special needs searches are permitted even where regulations proscribe violations of criminal law or conduct that is violative of the criminal law, *Von Raab*, 489 U.S. at 663, *Skinner*, 489 U.S. at 621 n.5, *T.L.O.*, 469 U.S. at 340, it is not clear that

institutions could treat all criminal offenses as rule violations and then rely upon special needs searches to pursue all such misconduct. Some forms of criminal conduct, *e.g.*, falsification of individual tax returns, would not disrupt the university workplace nor the dormitory environment, nor would they impair the ability of the university to achieve its mission. Nondisruptive criminal conduct would not appear to present the harms that the special needs doctrine seeks to avoid; hence, it is not clear that special needs searches could be used to root out such misconduct.

d. In this context, consideration should be given to the *T.L.O.* observation that the restrictions of conduct by children might be permitted in the K-12 setting even though such conduct would be perfectly permissible if undertaken by adults. *T.L.O.*, 469 U.S. at 339. It would appear to follow that the regulation that a university might seek to enforce through a special needs search would have to be shown to be an appropriate restriction on adult conduct.

For example, searches to find evidence that students had engaged in commercial transactions would be permitted only insofar as the regulation proscribing such transactions comported with the First Amendment rights of the students. *See, e.g., Fox*, 491 U.S. at 480, 486 (remanding for determination whether dormitory rules comported with First Amendment doctrines governing commercial speech). The *T.L.O.* court noted that, absent any suggestion that particular rules violate substantive constitutional guarantees, the courts should defer to the judgment of educational officials that certain forms of conduct are destructive of school order or of a proper educational environment. *T.L.O.*, 469 U.S. at 342 n.9. This deference to the educator judgment compares to the deference given academic judgment. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). But consider *UWM Post v. Board of Regents of University of Wisconsin*, 774 F.Supp. 1163 (E.D. Wis. 1991) (university hate speech code facially invalid); *Doe v. University of Michigan*, 721 F.Supp 852 (E.D. Mich. 1989) (university harassment policy unconstitutionally overbroad and vague).

C. The contents of lockable personal property located on institutional property should be treated as fully subject to Fourth Amendment protections. *Ortega*, 480 U.S. at 716; *Von Raab*, 489 U.S. at 671.

1. The extent to which the special needs doctrine will permit the search of the contents of closed employee, student or visitor personal property remains unclear. *Ortega* instructed that:

> "Not everything that passes through the confines of the business address can be considered part of the workplace context, however. An employee may bring closed luggage to the office prior to leaving
> on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage or a briefcase that happens to be within the employer's business address." *Ortega*, 480 U.S. at 716 (emphasis in the original).

Although the court qualifies its statements by asserting that workplace standards do not *necessarily* apply to the search of closed private property, it does not elaborate on the situations in which searches of such property might be permitted.

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2. The containers employees bring to work, and presumably automobiles parked in university lots, then, hold a different status from publicly owned property that has been made available to public employees for the convenience of the public employer. *Ortega* does not permit public employers to assume that they will have access to the contents of such containers for the routine administrative or for the work-related investigatory purposes that permit special needs searches of public property entrusted to employee control.

3. *Griffin* and *T.L.O.* and their progeny permit intrusive searches of personal property upon individualized suspicion, but their application to the university setting must be regarded with suspicion since they involve the search of property controlled by probationers and children, categories of persons who, unlike public employees or university students, stand in a special custodial or quasi-custodial relation to the state. *Vernonia*, 115 S.Ct. at 2391-92 (school district power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults); *Griffin*, 483 U.S. at 474 (probationers enjoy only conditional liberty dependent upon observance of special probation conditions); *United States v. Lewis*, 71 F.3d 358, 361-62 (10th Cir. 1995) (parole system is a controlled passageway between prison and freedom; to monitor adequately a parolee's progress and to deter further criminal conduct, a parole agent must be permitted in the proper instance to act expeditiously and without warning).

4. The contents of closed resident property found in dormitories surely should be given at least as much protection under the Fourth Amendment as comparable containers found in university workplaces.

D. Institutionally owned and operated electronic communications and information processing equipment should fit within the *Ortega* precedent.

1. As with government supplied desks and filing cabinets, access to such resources is provided to employees and students for the sole purpose of advancing the missions of the university, and employees and students may avoid exposing personal material by simply not using institutionally owned electronic communications or information processing facilities to communicate or to record such information. *Ortega*, 480 U.S. at 720.

2. Employees or students may have reasonable expectations of privacy, for purposes of the Fourth Amendment, in some but not all records contained in university computer files.
   a. Records seem to present special Fourth Amendment problems. In general, information delivered to or compiled by third parties does not implicate Fourth Amendment interests. *United States v. Miller*, 425 U.S. 435, 440-43 (1976) (bank customers have no protectable interest in bank records that they neither own nor possess and that compile information that they voluntarily submit to the bank); *United States v. Lyons*, 992 F.2d 1029, 1031-32 (10th Cir. 1993) (the inability to claim a right to control records, including computer records, would be fatal to a Fourth Amendment claim); *Hunter v. S.E.C.*, 879 F.Supp. 494, 499 n.6 (E.D. Pa. 1995) (Fourth Amendment protects individuals' privacy in *their* papers; they have confidentiality interests in information controlled by others).

      i. The Court recognizes three distinct ranges of privacy, only one of which is protected under the Fourth Amendment:

> "The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of

an individual to be free in action, thought, experience, and belief from governmental compulsion." Kurland, *The Private I*, UNIVERSITY OF CHICAGO MAGAZINE 7, 8 (autumn 1976). The first of these . . . is directly protected by the Fourth Amendment. *Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977).

Records relating to individual employees and students, whether containing information communicated by those individuals or whether obtained by the university, otherwise would generally fall under the second range of privacy doctrines. *Id.*, at 603-606 (finding no federal constitutional privacy interest in computer records identifying persons who had obtained prescriptions for certain controlled substances that the state had collected from healthcare professionals, at least where the records were subject to comprehensive regulations to protect confidentiality and to prevent unnecessary disclosure).

NOTE: The right to be protected from governmental disclosure of one's private affairs may attach to private correspondence or documents incorporated into a body of records that otherwise comprise governmental records. *Nixon v. Administrator of General Service*, 433 U.S. 425, 457 (1977).

ii. Oftentimes, Congress and legislatures respond to individual interests in maintaining the confidentiality of records maintained by third parties by enacting comprehensive legislation to protect such interests. The legal effects of this legislation are not altogether clear. The Court has recognized that such congressional action may be responsive to legitimate privacy expectations. *U.S. Dep't. of Justice v. Reporter's Committee*, 489 U.S. 749, 765 (1989) (Freedom of Information Act and its regulations taken as a whole evidence congressional intent to protect privacy of rap-sheet subjects). It has been held that rights created by Congress in response to *Miller* create statutory rights without constitutional dimensions. *United States v. Kington*, 801 F.2d 733, 735 (5th Cir. 1986) (construing the Right to Financial Privacy Act).

b. *Miller* and *Whalen* notwithstanding, the Court has shown its willingness to entertain the question whether persons might assert a Fourth Amendment claim to information held by others. *See, e.g., Smith*, 442 U.S. at 743-44 (relying upon Fourth Amendment analysis to determine whether subjective expectations of privacy in the telephone numbers dialed were reasonable); *Nixon*, 433 U.S. at 456-65 (resolving privacy claims in personal materials accumulated among presidential papers by analogy to Fourth Amendment doctrines governing electronic surveillance of conversations). While precedent is scarce, *United States v. McManus*, 70 F.3d 990, 1995 U.S. App. LEXIS 33294 (8th Cir. 1995), suggests that the use of records in a manner that is consistent with the purposes for which they are collected will comport with the Fourth Amendment. The *McManus* court declined to decide whether a check of National Crime Information Center database constituted a search for Fourth Amendment purposes, holding that the records check was related to the investigation of McManus' stolen vehicle report and would have been constitutional even if it had implicated Fourth Amendment concerns. *Id.*, 1995 U.S. App. LEXIS 33294 at *7-*10.

3. Voice and electronic communications systems present distinctive questions under the Fourth Amendment. Although live and stored transmissions are regulated by the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510-2522, they may also be subject to

Fourth Amendment protections even while possessed by others. *United States v. Maxwell*, 42 M.J. 568, 576 (A.F. Ct. Crim. App. 1995) (the Electronic Communications Privacy Act implicitly recognizes that the people have reasonable expectations of privacy in e-mail stored on America On Line computers); *Tyler v. Berodt*, 877 F.2d 705 (8th Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990) (test for constitutional claim and Wiretap Act is the same).

a. Though *Miller* held that Fourth Amendment interests were not implicated in the bank records at issue there--negotiable instruments, loan payments, savings transactions--the decision also laid the ground for the conclusion that legislative action might give rise to Fourth Amendment interests in records held by another. Two distinctions drawn by the *Miller* Court warrant especial attention:

   i. First, the Court noted that, in adopting the Bank Secrecy Act, Congress assumed that bank customers had no Fourth Amendment interests in the records in question, since it adopted the recordkeeping requirements in order to facilitate criminal tax prosecutions and regulatory investigations. *Miller*, 425 U.S. 442-43 (citing 12 U.S.C. § 1829(a)(1)).

   ii. Second, the Court insisted that the Fourth Amendment issue hinged upon the status of the particular documents: "We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents." *Id.*, at 442.

      (1) The Court found no legitimate expectations of privacy in the contents of the documents. "The checks are not confidential communications, but negotiable instruments to be used in commercial transactions." *Id.*

      (2) The Court reserved the question whether evidentiary privileges might give rise to an expectation of privacy in privileged information communicated, say, to an attorney that would allow the holder of the privilege to assert a Fourth Amendment right. *Id.*, at 443 n.4.

   iii. The *Miller* analysis suggests that the ECPA might well ground expectations of privacy that cloak employee or student communications with Fourth Amendment protections. Unlike the Banking Secrecy Act in *Miller*, the ECPA embodies a Congressional design to protect communications from unsupervised disclosure to law enforcement, not to require its preservation for the benefit of law enforcement. The attempt to protect the confidentiality of communication holds more in common to the policies that support evidentiary privileges than with the policies that preserve records that may be of assistance to law enforcement or regulatory efforts. The social utility of the technology would be diminished if persons who used it had to fear disclosure of their communications. Under such circumstances, reasonable people would be unlikely to make full use of the communications technology. *Cf. id.* (citing *Fisher v. United States*, 425 U.S. 391, 403 (1976) (discussing basis of attorney-client privilege)).

      (1) NOTE: Congress acted on the assumption that *Miller* precluded Fourth Amendment protection for computer records. S. Rep. No 541, 99th Cong., 2d Sess. 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557. Still, Congress was motivated by a conviction that where persons

or businesses relied upon third parties to transmit, to store or to process data, their "privacy or proprietary interest[s] in that information should not change" merely because they used a third party provider. *Id.* At the same time, understanding the ECPA to protect electronic communications against unauthorized acquisition only where a reasonable expectation of privacy existed, Congress sought to clarify those reasonable expectations. *Id.*, 1986 U.S.C.C.A.N. at 3558.

(2) It has long been clear that comprehensive Congressional regulatory schemes can modify, by reducing, expectations of privacy. *Burger*, 482 U.S. at 701 (pervasive regulations reduce expectations of privacy); *Donovan v. Dewey*, 452 U.S. 594, 605 (1981) (comprehensive federal legislation, Federal Mine Safety and Health Act of 1970, provided means to accommodate Fourth Amendment concerns).

(3) The logic that suggests that comprehensive regulations may diminish expectations of privacy would seem to suggest that comprehensive regulations designed to safeguard reasonable expectations of privacy by protecting against wrongful use or public disclosure by law enforcement authorities and unauthorized private parties, 1986 U.S.C.C.A.N. at 3557, should equally extend Fourth Amendment protections. In both cases, the comprehensive regulations would shape business practices in ways that shape expectations of privacy. *See, e.g., Maxwell*, 42 M.J. at 575-76 (recognizing an objective expectation of privacy in e-mail messages stored in America On Line computers that would be subject to regulation under the ECPA) (overruling a trial court holding that a sender had no reasonable expectation of privacy in messages that had been transmitted, even though such messages could not be recalled and erased, were transferred to persons whose true identities were not known and were transferred to multiple individuals).

b. The ECPA protects communications transmitted by members of the public over third party communications systems from access by private persons, law enforcement and government entities. These protections allow for various forms of access to the contents of messages by communications service providers.

i. The ECPA regulates the practices of extramural telecommunications businesses and law enforcement organizations in ways that might ground legitimate expectations that oral, wire or electronic communications transmitted or stored by such providers will not be disclosed to third parties, including law enforcement agencies or other governmental entities. *See e.g., Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994) (upholding district court damage award against government where law enforcement officers seized computers belonging to a communications service under a warrant that authorized them to read information stored on the computers that might constitute evidence of federal crimes and read unopened subscriber e-mail stored on the computer, the latter being found to constitute an unauthorized interception of wire communications); *Maxwell*, 42 M.J. at 575-76 (recognizing an objective expectation of privacy in e-mail messages stored in America On Line computers) (characterizing the facts as though the use of passwords reduced access to stored messages or live transmissions to other individuals with designated passwords) (holding that the ECPA explicitly recognized such expectations

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of privacy as reasonable).

(1) The interception of wire, oral or electronic communications by law enforcement officials requires a court order. 18 U.S.C. §§ 2516-2518. Electronic communications stored for 180 days or less may be accessed by government entities pursuant to search warrant or, where stored for longer periods, under a warrant, grand jury subpoena or court order. *Steve Jackson Games*, 36 F.3d at 464 (citing 18 U.S.C. § 2703). Stored wire communications require a court order. *Id.* (citing 18 U.S.C. § 2518).

(2) Note that disclosure of the contents of wire or electronic communications is permitted under various circumstances, especially with the consent of senders or recipients. 18 U.S.C. § 2511(3)(b), 2702(b).

ii. The ECPA allows communications service providers to the access to the contents of oral, wire (including digitalized voice communications or voice mail) or electronic (*e.g.*, e-mail) communications (1) when the interception, use or disclosure of the communication is necessary in connection with providing the communication service or (2) in order to protect the rights of the service provider. 18 U.S.C. § 2511(2)(a)(i). As to wire communications (*e.g.*, digitalized voice communications), providers may not conduct surveillance or random monitoring except for mechanical or service quality control checks. *Id.* E-mail or other electronic communications may be subject to routine monitoring while in transit; "[i]n applying the [restriction] only to wire communications, this provision reflects an important technical distinction between electronic communications and traditional voice telephone service. The provider of electronic communications services may have to monitor a stream of transmissions in order to properly route, terminate, or otherwise manage the individual messages they contain." 1986 U.S.C.C.A.N. at 3574. The restrictions on the further disclosure of such information, 18 U.S.C. § 2511(3) generally track those provided in section 2702, discussed in subparagraph iii, immediately below.

iii. The ECPA restricts the powers of entities providing electronic communications services to the public or remote computing services to the public from knowingly divulging the contents of electronically stored communications or the contents of computer files that were submitted electronically solely for the purposes of storage or computer processing. 18 U.S.C. § 2702(a). The general prohibition is subject to various exceptions apart from those relating to the provision of access to intended recipients, including (1) under circumstances that permit access to messages in transit under 18 U.S.C. § 2511(2)(a); (2) where necessary to provide the remote computing or the storage service or to protect the service provider's rights; (3) with the consent of an originator or recipient of communications or a subscriber of computing services; (4) to persons whose facilities were used to forward the messages or data files; (5) to law enforcement agencies where the contents were obtained inadvertently by the service provided and where they appear to pertain to the commission of a crime. 18 U.S.C. § 2702(b).

(1) Congress anticipated that the disclosures permitted under 18 U.S.C. § 2702(b) would fall into one of three categories: (a) Those authorized by either the sender or

receiver of the message; (b) those made to government entities pursuant to procedures outlined in the code; and (c) "disclosures which are necessary for the efficient operation of the communications system. Such business procedures are included in the section 2511(2)(a) exemption as well as the exemptions of this subsection relating to the disclosure of the message to forwarding facilities and the exemption of service provider activities designed to protect the system and perform the service." 1986 U.S.C.C.A. N. at 3591-3592.

(2) The distinction drawn here suggests that governmental communication system operators, *e.g.*, in states where wide area communications systems number among centralized services, should not assume that they enjoy any latitude to disclose the contents of messages for purposes unrelated to the efficient operation of the system.

c. NOTE: Users of internal university communication systems may be subject to lesser expectations of privacy as to those portions of their transmissions that traverse or reside in university equipment.

i. 18 U.S.C. § 2510(15) extends the coverage of the ECPA to "any service which provides to users thereof the ability to send or receive wire or electronic communications." This would encompass university owned telephone, e-mail and internet systems.

ii. 18 U.S.C. § 2510(5) permits universities to use telephone or communications computers to intercept and to monitor communications, whether oral, wire or electronic, in transit over their internal systems, provided that communication service operators use the equipment in the ordinary course of providing such services and provided that the universities use the interception equipment in the ordinary course of their business. Courts have not been expansive in their construction of the employer exceptions to the prohibition on interception of telephone calls in cases involving non-business, personal calls. They typically insist that an employer show some nexus between the surveillance and the employer's business interests. *See generally,* Raphael Winick, *Searches and Seizures of Computers and Computer Data,* 8 Harv. J. L. & Tech. 75, 90-98 (1994) (discussing cases); Thomas R. Greenber, Comment: *E-Mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute,* 44 Am. U. L.R. 219, 238-46 (1994) (reviewing cases); Julia Turner Baumhart, *The Employer's Right to Read Employee E-mail: Protecting Property or Personal Prying,* 8 Lab. Law. 923, 929-35 (1992) (discussing cases); *In re State Police Litigation,* 888 F.Supp. 1235, 1265-66 (D.Conn. 1995).

iii. 18 U.S.C. § 2511(2)(a) as operators of internal communications systems, universities would have the rights of access noted in subparagraph (b) above. It should be noted that the restrictions on the monitoring telephone messages that apply to communication service providers to the public would not apply to universities that operate internal telephone systems. Universities should also be cognizant that Congress viewed the exceptions to the rule against disclosure stated under 18 U.S.C. § 2511(2)(a) as being of a tissue with those set out in 18 U.S.C. § 2702(b), their purpose being to permit system operators "to protect the system and perform the service." 1986 U.S.C.C.A. N. at 3591-3592. This suggests that some caution should be exercised before using information acquired

in the course of providing voice or electronic services for purposes unrelated to the protection of the system or the performances of the services.

iv. 18 U.S.C. § 2511(2)(g) provides broad rights of access to communications that are posted in a manner that is readily accessible to the general public. This exception would seem pertinent to websites and various forms of Internet postings.

v. 18 U.S.C. § 2511(2)(h)(ii) permits providers to record the initiation and completion of electronic communications for the limited purpose of protecting against fraudulent, unlawful or abusive use of its service.

vi. 18 U.S.C. § 2701 proscribes the unauthorized access to or alteration of stored wire or electronic communications by private parties, law enforcement and other governmental entities. The service provider may authorize access to stored communications. 18 U.S.C. § 2701(c)(1). Thus, a university would appear to have the power to grant access to stored messages, even, it must be presumed, those messages that it would not have been able to intercept in transit, *e.g.*, insofar as the interception of personal messages cannot be analyzed as falling within its usual business operations. Section 2702(b), which restricts the right of communication systems providers to the public to disclose information for purposes unrelated to the operation of the system, does not apply to internal communication systems. Nor would the parallel restrictions on the use messages intercepted in transit, 18 U.S.C. § 2511(3)(b), seem to restrict university use of stored communications. Consideration should also be given to the possibility that disclosure of personal information by governmental system operators might implicate constitutional privacy interests. *Nixon*, 433 U.S. at 457; *Whalen*, 429 U.S. at 603-606.

vii. 18 U.S.C. §§ 2511(3)(b) permits access to communications in transit with the consent of senders, addressees or intended recipients of communications. Universities should attempt to define the scope of consent through access policies that alert users to the possibility that communications may be subject to monitoring while in transit or when in storage. Courts may recognize that such policies are relevant to establishing implied consent to monitoring. *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 581-582 (11th Cir. 1983) (consent to monitoring of business calls did not encompass consent to monitoring of personal calls).

d. The complement of ECPA rules suggest that reasonable expectations of privacy, for Fourth Amendment purposes, may depart from the precedent set by *Smith* and *Greenwood* in which the reasonableness of expectations were those that would be accepted by a person who fully understood the processes involved in placing telephone calls or collecting garbage. The ECPA tries to strike a balance between the needs of system operators to monitor their equipment, to confirm the levels of service, to protect their customers and to protect their own interests and the interests of users in limiting access to their messages by persons other than those to whom they were addressed and, especially, by law enforcement and other government officials. The emphasis on limiting access by government officials, a core Fourth Amendment concern, suggests that the relatively broad rights of access granted system operators in order to assure the efficient operation of their systems may not defeat the claim of Fourth Amendment interests where message contents are used for purposes unrelated to the specifically

identified statutory exemptions.

e. Assuming, *arguendo*, that the Fourth Amendment may be fully applicable to communications while in transit or while in storage in university communications systems, it would appear that university access to the contents of communications or stored files could be analyzed under *Ortega*. The ECPA exceptions that permit system operators to monitor transmissions incidentally to routine operation of the system or to investigate instances of suspected misuse of the system align themselves quite nicely alongside the *Ortega* doctrines. Access to employee or student communications or files by systems operators under the ECPA would all be for routine administrative purposes or for non-criminal investigatory purposes connected to system related misconduct.

f. NOTE: Web sites or postings that can be accessed by the general public through the Internet could be accessed freely under the ECPA, 18 U.S.C. § 2511(2)(g), or the Fourth Amendment, where there would be no expectation of privacy in matters laid before the public. *Hodari*, 499 U.S. at 629; *Greenwood*, 486 U.S. at 40-41.

g. Caution should be exercised when trying to characterize student access to university owned electronic communications systems. Access to computer systems may well be provided primarily to advance university purposes. Access to telephone systems, especially by student occupants of university residences, may well be more nearly comparable to the relation between utility and customer.

4. Employee or student owned communications or information processing equipment should be treated as other locked possessions that happen to be in non-residential portions of university property. *See U.S. v. Lynch*, 908 F.Supp. 284, 287 (D.V.I. 1995) (information stored electronically in a pager is analogous to personal address books or other repositories of information in which individuals have privacy interests protected under the Fourth Amendment) (citing *United States v. Chan*, 830 F.Supp. 531, 534 (N.D.Cal. 1993); *United States v. Nelson Blas*, 1990 U.S.Dist. LEXIS 19961 (E.D.Wis. 1990). This would preclude the inspection of those portions of privately owned communications equipment, *e.g.*, private servers, that could be accessed by the general public.

II. Do not rely upon contracts, regulations or other formalistic approaches to claim implied consent to searches.

A. *Vernonia* casts suspicion on the sufficiency of contractual provisions that purport to effect a blanket consent to searches that otherwise would require justification consistent with that exacted of criminal investigations, administrative inspections or special needs searches. The Court attached no independent significance to the presence of signed consent forms when it concluded that student athletes had a lower expectation of privacy than other groups within the student population. *Vernonia*, 115 S.Ct. at 2392-93.

B. *Skinner* and *Von Raab* tend to support a similar conclusion. The regulations that required submission to drug tests were to become, either expressly or by necessary implication, part of the employment contract for the respective groups of employees, but the Court did not appear to think that a contract provision requiring a search would suffice to resolve the Fourth Amendment concerns, for it sought other grounds based upon the practical realities of the workplace, as opposed to their contractual ground, to determine the scope of employee expectations of privacy. *Skinner*, 489 U.S. at 624-27; *Von Raab*, 489 U.S. at 667.

C. Probation cases often allude to the fact that in accepting probation, individuals consent to subject themselves to warrantless searches, but the

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courts generally do not rest their analysis on that ground, proceeding, instead, to examine the facts under *Griffin*. *See, e.g., United States v. Hill*, 967 F.2d 902, 908-10 (3rd Cir. 1990).

D. The critical issue will be the degree to which employees or students have legitimate expectations of privacy in the university settings. As in *Ortega*, this will hinge on actual university practices.

E. Free and voluntary consent by persons who have common authority to the place being searched will support a valid search. *Matlock*, 415 U.S. at 171. Where third parties have express or implied permission to access places or the contents of containers, they may give effective consent to searches. *United States v. Buettner-Janusch*, 646 F.2d 759, 765-67 (2d Cir. 1981) (to perform their expected tasks, university lab assistants had implied authority to access laboratory and chemicals stored therein and could give effective consent to police search of the laboratory and its contents).

III. University search policies should make clear who is entitled to search, and such individuals should have a clear understanding of the permitted scope of special needs searches.

A. An abiding concern of the Fourth Amendment is to assure persons who are subject to search that the person conducting the search has proper legal authorization to conduct the search or inspection. *Von Raab*, 489 U.S. at 667; *Burger*, 482 U.S. at 703.

B. Comprehensive regulations meet this concern in many admininstrative contexts. *Id.* The special needs searches approved by the Court in *T.L.O.*, *Griffin*, *Ortega*, *Skinner*, *Von Raab* and *Vernonia* were all undertaken by persons who exercised some degree of supervisory authority over the persons being searched. Hence, especially if nonsupervisory personnel are used to conduct searches, the policy should indicate to persons to be searched the basis for the authority of such officials to conduct the search.

C. The use of law enforcement personnel to conduct a special needs search is not necessarily fatal to the search, but it must always be clear that the circumstances giving rise to the search must be related to purposes other than law enforcement. *Vernonia*, 115 S.Ct. at 2390 (search by law enforcement officials to discover evidence of criminal wrongdoing requires warrant); *Griffin*, 483 U.S. at 871 (three law enforcement officers accompanied a probation officer who sought evidence of parole violation); *Burger*, 482 U.S. 716-17 (police officers have many duties in addition to those involving traditional police work) (administrative scheme not invalid because, in the course of enforcing it, a police officer may discover evidence of crimes in addition to violations of administrative rules).

a. The university should consider how reliance on law enforcement officers will affect its ability to show that its special needs administrative search policy does not operate as a pretext to enable law enforcement authorities to gather evidence of penal violations. *See Burger*, 482 U.S. at 716 n.27.

b. The Court has made it clear that it will expect a persuasive showing that a special needs search protocol was designed as a pretext to enable law enforcement authorities to gather evidence of penal violations. *Skinner*, 489 U.S. at 621 n.5.

2. University obligations under the Campus Crime Act may complicate efforts to use law enforcement personnel to support university special needs searches. The act requirements include an annual security report that includes:

> A statement of current policies concerning campus law enforcement, including--

(i) the enforcement authority of security personnel, including the working relationship with State and local police agencies; and

(ii) policies which encourage accurate and prompt reporting of all crimes to the campus police and the appropriate police agencies. 20 U.S.C. § 1092(f)(1)(C).

3. 20 U.S.C. § 1092(f)(1)(C)(ii) clearly anticipates that universities will adopt policies to encourage accurate and prompt reporting of all crimes to campus police *and* appropriate police agencies.

4. It would appear that universities would be under some obligation to expect that law enforcement personnel assisting with special needs searches would report any evidence of criminal wrong-doing.

   a. Under such circumstances, especially in connection with rule infractions that also constitute criminal offenses, the university that relies upon campus law enforcement officials to conduct searches may be posturing itself for a challenge that it operates its special needs search as a pretext for criminal investigations.

   b. *Skinner* reserved the question whether the routine use in criminal prosecutions of evidence obtained through special needs searches would bottom an inference of pretext or otherwise impugn the administrative nature of the warrantless search on less than probable cause. *Skinner,* 489 U.S. at 621 n.5.

   c. Routine use of law enforcement personnel to conduct special needs searches, coupled with efforts to comply with the Campus Crime Act, would appear to set a university on a path that would lead to the routine use in criminal prosecutions of evidence obtained through special needs searches.

B. The policy should carefully limit the scope of warrantless searches.

1. The scope of a search undertaken pursuant to consent is limited by the terms of the consent. *Walter,* 447 U.S. at 656-57 (consent to search a garage would not implicitly authorize a search of an adjoining house).

2. Officials who initiate special needs searches should be able to articulate particular grounds for their decision to search a given workplace or a given dormitory room and, especially, any closed personal property located therein. The O'Connor dissent in *Vernonia* underscores the need for concern where searches spread so wide that there are only attenuated grounds to suspect that occupants, individually, may have been involved in or have evidence of misconduct. Justice O'Connor took pains to suggest that general searches without individualized suspicion were core concerns of the framers. *Vernonia,* 115 S.Ct. at 2398-99. This may suggest that floor-wide searches of the sort approved in *State v. Hunter,* 831 P.2d 1033 (Utah App. 1992) (following *State v. Kappes,* 26 Ariz.App. 567, 550 P.2d 121 (1976)), may be found defective insofar as they involve the search of a proportionately large number of persons who are not thought to have broken any rule. *Vernonia,* 115 S.Ct. at 2398-99; *but see State v. Ziegler,* 93-3019 (La. 5/23/94), 637 So.2d 109, 113 (supervisor searched desks within office from which bogus documents may have been sent).

3. The grounds for entering the room, the contraband sought, would determine what portions of the room could reasonably be searched when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct. *Ortega,* 480 U.S. at 726. A search for a rifle, for instance, would not justify inspection of a desk drawer. *Horton,* 496 U.S. at 140-42; *Ross,* 456 U.S. at 824.

4. Searchers may follow the trail of evidence, proceeding to more intrusive searches where one piece of evidence suggests that more may be found. *T.L.O.*, 469 U.S. 346-47; *Edwards v. Commins*, 1990 WL 149209 (E.D. Pa (1990).

5. Be sure that searchers understand that they may not otherwise change the character or scope of their investigation. *Alexander*, 29 F.3d at 1361.